Filed 3/8/19 P. v. Rogers CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RONALD ARTHUR ROGERS, Defendant and Appellant.	G054707 (Super. Ct. No. M-9530) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James Edward Rogan, Judge. Affirmed.

Rudy Kraft, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Daniel Rogers, Christopher Beesley, and Adrianne S. Denault, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Ronald Arthur Rogers appeals from the trial court's judgment committing him to a state hospital following a jury's finding he was a sexually violent predator (SVP) per the Sexually Violent Predators Act (SVPA) (Welf. & Inst. Code, § 6600 et seq.)[1] Rogers contends he was prejudiced by the introduction of (a) inadmissible hearsay evidence, (b) improperly redacted documentary evidence, and (c) case-specific expert witness testimony elicited in violation of *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). He also claims he was denied his right to effective assistance of counsel because his trial counsel failed to object to the hearsay evidence and failed to seek additional redactions from the documentary evidence. Finally, he argues the cumulative effects of these errors require reversal.

We conclude Rogers forfeited his hearsay and redaction claims by his failure to object in the trial court. Because most of the now-challenged exhibits were otherwise admissible, and any error in admitting the others was harmless in light of other properly admitted evidence, Rogers's ineffective assistance of counsel claim fails because he has not demonstrated prejudice. For the same reasons, any *Sanchez* error was harmless. As a result, there was no prejudicial error to cumulate. We therefore affirm the judgment.

I.

INTRODUCTION

The SVPA provides for the indefinite involuntary civil commitment of persons who meet specified criteria following the completion of their prison terms. (*People v. McKee* (2010) 47 Cal.4th 1172, 1186-1187 (*McKee*).) Three conditions are necessary to designate a person as an SVP: "(1) [a] conviction of a 'sexually violent offense'; (2) a diagnosed mental disorder that makes a person a danger to the health and

[1] All statutory references are to the Welfare and Institutions Code unless otherwise stated.

safety of others; and (3) the mental disorder makes it likely the defendant will engage in 'sexually violent criminal behavior.' [Citation.]" (*People v. White* (2016) 3 Cal.App.5th 433, 448; see also *People v. Burroughs* (2016) 6 Cal.App.5th 378, 383 (*Burroughs*), and § 6600, subd. (a)(1).) A "'[d]iagnosed mental disorder' includes a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others." (§ 6600, subd. (c).)

The People had the burden to establish Rogers was an SVP, and the jury must have agreed unanimously before making their SVP finding. (*Reilly v. Superior Court* (2013) 57 Cal.4th 641, 648.) There must have been proof beyond reasonable doubt "that because of a diagnosed mental disorder affecting the person's volitional or emotional control, '"it is likely he or she will engage in sexually violent behavior" if released.' [Citations.] 'Likely,' in this context, does not mean more likely than not; instead, the standard of likelihood is met 'when "the person presents a substantial danger, that is, a serious and well-founded risk, that he or she will commit such crimes if free in the community." [Citations.]'" (*People v. Shazier* (2014) 60 Cal.4th 109, 126 (*Shazier*).)

A "sexually violent offense" includes a felony violation of Penal Code sections 261, 262, 264.1, 269, 286, 288, 288a, 288.5, or 289, "when committed by force, violence, duress, menace, fear of immediate and unlawful bodily injury on the victim or another person, or threatening to retaliate in the future against the victim or any other person," or "any felony violation of [Penal Code sections] 207, 209, or 220" that is "committed with the intent to violate [Penal Code sections] 261, 262, 264.1, 286, 288, or 289 of, or former [Penal Code section] 288a." . . . ." (§ 6600, subds. (a)(2)(A)-(I), (b).)

The existence of a qualifying prior conviction, and the details underlying its commission, may be shown "by documentary evidence, including, but not limited to, preliminary hearing transcripts, trial transcripts, probation and sentencing reports, and evaluations by the State Department of State Hospitals." (§ 6600, subd. (a)(3).)

Consequently, the People were "allow[ed] the use of multiple-level hearsay to prove the details of the sex offenses for which the defendant was convicted." (*People v. Otto* (2001) 26 Cal.4th 200, 208 (*Otto*).)

"Expert testimony, specifically testimony regarding diagnosis of a current mental disorder, is an important element in an SVPA civil commitment proceeding." (*People v. Roa* (2017) 11 Cal.App.5th 428, 443 (*Roa*).) In fact, "expert testimony is critical" because "the primary issue is not, as in a criminal trial, whether the individual committed certain acts, but rather involves a prediction about the individual's future behavior." (*McKee, supra,* 47 Cal.4th at p. 1192.)

II.

FACTS

Rogers has a history of sexually assaulting women: two in 1987, and three in 1989. Rogers's 1989 crimes resulted in four qualifying-offense convictions under the SVPA. (§ 6600, subds. (a)(2), (b).) The facts underlying his 1987 crimes, which resulted in a plea bargain to a nonqualifying offense, provided additional evidence the People's experts relied upon in reaching their opinions Rogers was an SVP.

A. *The 1989 SVPA-Qualifying Sexual Assault Convictions*

In 1989, during a two-week span, Rogers sexually assaulted three women: P.G., T.R., and S.P. None testified at trial, but Santa Ana Police Department reports provided the underlying details of the crimes (§ 6600, subd. (a)(3)).

On March 14, 1989, P.G. was working as a prostitute when Rogers drove up and asked the price for oral copulation. When he agreed to her $20 price, she got into his car. After driving for a while, Rogers stopped the car, acted as if he was looking for money in his wallet, and then punched P.G. This broke her glasses and caused her nose to bleed. He ordered her to "undo my pants and suck my dick and you better be good." Once his penis was in her mouth, he drove away and whenever she tried to raise her head he pushed it back down. He stopped the car and asked her, "do you want me to fuck you

in your pussy or take it from your butt?" Rogers then raped her and told her he would have to kill her because she would report it. She promised not to tell if he let her go. She also promised to move in with him, at which point Rogers said he would let her go. He then ejaculated and apologized for hitting her. When she noticed he was not looking, she opened the door and escaped. Rogers drove off.

Ten days later, Rogers attacked T.R., a 22-year-old woman also working as a prostitute. After T.R. got into his car, Rogers asked her if she was "dating," to which she responded it was a possibility, and asked what he was looking for. Rogers said oral copulation, asked how much it would be, and T.R. said $20. T.R. directed Rogers to a location where they stopped. He took a $10 bill and some $1 bills out and gave them to her. She was about to tell him it was not $20, when Rogers elbowed her in the mouth, cutting her lip.

Rogers told her to be quiet and he would not hurt her. He then ordered, "now give me some head." She put a condom on his penis and began to orally copulate him. After a couple of minutes, Rogers told her to stop and made her lie down in the front seat. He told her to turn over onto her stomach and then tried to handcuff her with a plastic zip-tie he retrieved from the back seat. She resisted and attempted to escape. Rogers put her in a chokehold and punched her in the eye and face several times. She continued to struggle and finally was able to get out the door. Rogers grabbed her ponytail to prevent her from getting out, but it was a hairpiece and came off in his hand.

Three days later, Rogers assaulted S.P., a 21-year-old woman working as a prostitute. He approached S.P. while she was at a pay phone, put a hard metal object against her back and forced her into his car. He told her to stay silent or he would kill her. She tried to escape, but the door latch on the passenger side was disabled. Rogers drove into a nearby residential area. He threatened to kill her if she tried to fight him.

He punched S.P. in the face and she lost consciousness. When she awoke, he forced her to orally copulate him while he held a knife to her and fondled her breasts.

S.P. again tried to open the door but it would not open until Rogers did something on his side of the car to unlock it. Rogers drove back to where he abducted her, pushed her out of the car, and sped off.

In connection with these sexual assaults, Rogers pleaded guilty to three counts of forced oral copulation (Pen. Code, § 288a, subd. (c)), and one count each of forcible rape (Pen. Code, § 261, subd. (2)), kidnapping (Pen. Code, § 207, subd. (a)), and false imprisonment (Pen. Code, § 236). The forcible rape and forced oral copulation convictions are qualifying "sexually violent offense[s]" under the SVPA. (§ 6600, subds. (a)(2), & (b).)

B. *The 1987 Non-Qualifying Sexual Assaults*

R.P. testified that in 1987, she accepted Rogers's offer of a ride. She occasionally worked as a prostitute, but said she was not working that night. After driving past where R.P. wanted to go, Rogers asked her if she wanted to have sex; she told him no. He offered to pay, saying, "I'll give you $25 for some head." Rogers continued to drive and went into an area she did not know. He said something like, "This is a good spot," and parked near some apartments. R.P. saw that Rogers's pants were undone. She tried to get out of the car, but the locked door would not open.

Rogers had a plaster cast on his right forearm. After R.P. again refused to have sex with him, Rogers hit her in the face with the cast, grabbed her hair and forced her head "into a position on top of his private parts." Rogers's blow had dazed her and she "was scared for [her] life. [She] had never been hit before." Rogers held the back of R.P.'s neck, pushed her head down towards his groin, and repeatedly hit her. Out of fear, she orally copulated him. When Rogers ejaculated in her mouth, he covered her mouth with his hand, held it shut, and forced her to swallow. She fearfully complied.

Rogers then told R.P. to take off her pants. She refused and he hit her. He grabbed her, tried to remove her bra, and told her he wanted vaginal sex. In an effort to dissuade him, R.P. lied and said she had a sexually transmitted disease. Rogers was

undeterred, so she again lied and said it was AIDS, but to no effect. Rogers then threatened her with a knife, increasing her fear. She complied with his demand, and removed her shirt and bra. He grabbed her by the hair and "said bad things to [her]," while painfully pinching her breasts. He told her to kiss him and "tell me it feels good." He struck her with his cast throughout the ordeal.

R.P. struggled and, during the scuffle, Rogers dropped the knife. They continued to wrestle as she climbed out the car window. Once out, R.P. ran away screaming while Rogers drove away.

Two weeks later, R.P. saw Rogers again in his car. She wrote down his license plate number and gave it to police. R.P. later identified Rogers as the man who had tried to rape her and threatened her with a knife. Rogers still had a cast on his arm.

The same day Rogers attacked R.P., he also attacked L.J. In a plea bargain, Rogers pleaded guilty to the false imprisonment of L.J. (Pen. Code, § 236), in exchange for the dismissal of the count charging an aggravated assault on L.J., and five other charges involving R.P. L.J. did not testify at trial, and the trial court limited any evidence regarding her attack to Rogers's admissions about the incident and to the fact she was the named victim of the false imprisonment charge to which Rogers had pleaded guilty in 1987. False imprisonment is not an SVP-qualifying offense.

C. *Dr. Robert Owen*

Psychologist Dr. Robert Owen, an independent evaluator, had conducted about 1500 SVP evaluations. Owen evaluated Rogers 10 times between 2002 and November 2016. He tried to meet with Rogers for each evaluation, but succeeded only once, in 2012. In that meeting, they discussed Rogers's criminal history, his treatment or lack thereof, and his plans.

In forming his opinion, Owen relied on his conversation with Rogers. Owen also relied on other sources, including police reports from Rogers's 1987 and 1989 offenses and a Nevada offense, abstracts of judgments reflecting Rogers's convictions,

records and reports from Atascadero and Coalinga State Hospitals, probation reports, court records, prison records, and other psychologists' previous evaluations. Owen also spoke with hospital staff who knew Rogers.

Owen concluded Rogers satisfied the first criterion for commitment under the SVPA — a conviction for a qualifying sexually violent offense. He relied on Rogers's 1989 convictions for forced oral copulation, forcible rape, and kidnapping to commit an enumerated sex crime. Owen opined these convictions were for violently committing enumerated sex crimes listed in section 6600, subdivision (b), and the convictions resulted in his incarceration.

Rogers spoke to Owen about his 1989 offenses against P.G., T.R., and S.P. Rogers initially claimed he did not recall the incident involving P.G. After Owen read some of the police reports to him, Rogers said, "That's her version. I think I hit her and said, 'suck my dick, bitch.' I backhanded her. Basically that was it." Rogers also admitted he ejaculated during the violent incident with P.G. When Owen asked about the S.P. incident, Rogers said, "I picked her up by the doughnut shop, I drove, I ended up hitting her and I told her, 'suck my dick, bitch.' She did. I came." Owen also spoke to Rogers about the 1987 incidents involving R.P. and L.J. Rogers admitted he attacked both women, and hit them with his casted arm. Rogers also acknowledged he forced R.P. to orally copulate him.

Owen concluded Rogers also met the second element under the SVPA — a diagnosed mental disorder that predisposes an individual to act out in a sexually violent, predatory manner. Owen diagnosed Rogers with sexual sadism disorder, antisocial personality disorder, and alcohol use disorder. Sexual sadism disorder was the primary diagnosis and, in Owen's opinion, it alone was sufficient to satisfy the second SVP element. The antisocial personality disorder diagnosis additionally exacerbated the primary sexual sadism disorder because it made a dangerous and sexually aggressive man even more impulsive, more reckless, and more violent.

Owen explained how Rogers's behavior during the sexual assaults was consistent with someone who had both sexual sadism disorder and antisocial personality disorder. Rogers had developed a pattern of selecting prostitutes in their 20's, isolating them in his car, hitting each in the face, and forcing most of them to perform oral copulation. Owen explained: "[T]here's something very different about Mr. Rogers that distinguishes him from other men and even typical rapists. He's a very different kind of guy because we see this pattern in all five victims, he struck every single one of them in the face, some of them very brutally, some had black eyes, bleeding on the nose, and such. So his prelude to oral copulation or to sexual intercourse was hitting them in the face, hard. . . . So this really ties into the whole sexual sadism that we see here, this fusion of real violence against a woman and sexual pleasure and an erection and ejaculation."

Owen explained the indicators for an antisocial personality disorder diagnosis include are behavioral or conduct problems as a child before the age of 15; failure to obey the law; deceitfulness, impulsiveness, irritability or aggressiveness; reckless disregard for others; irresponsibility; and lack of remorse. Owen reviewed Rogers's criminal history contained in a document admitted as exhibit No. 1, and described how Rogers's criminal history, which included multiple convictions, was consistent with his diagnosis of an antisocial personality disorder. Owen testified his review of records pertaining to Rogers from the California Department of Corrections and Rehabilitation (CDCR) and the Department of State Hospitals (DSH) further confirmed his diagnoses of sexual sadism and antisocial personality disorder.

In diagnosing Rogers with an alcohol abuse disorder, Owen relied on Rogers's driving under the influence arrest, which resulted in a reckless driving conviction, and CDCR records and DSH records showing Rogers had manufactured "pruno," a bootleg liquor made in custodial settings. Based on those records, Owen concluded Rogers had emotional and personal volitional impairments.

Owen concluded Rogers satisfied the third requirement for commitment under the SVPA — a likelihood Rogers would engage in sexually violent predatory behavior if released into the community. Owen administered the "Static-99R", an actuarial risk assessment test. Owen originally scored Rogers with a "4" but, after preparing his report, he looked at additional documents and raised the score to "5," which put Rogers within the moderate-high risk category, and slightly below the cutoff score of "6" for the high-risk group of sex offenders.

Owen also administered the "Structured Risk Assessment, Forensic Version," a test which looks at dynamic risk factors that change over time, such as attitudes and appropriate conduct. Owen scored Rogers as a sex offender in the "high risk/high needs" group, as opposed to the routine sample group. Owen also administered the "Hare Psychopathy Test", and scored Rogers a "32", which put him within the severe psychopathy range. Owens explained psychopaths are dangerous, dishonest, and aggressive individuals who possess no moral compass or empathy. They often are repeat offenders who gain pleasure from manipulating or hurting other people.

Owen based his opinion Rogers was likely to reoffend on more than these actuarial risk assessment tests. Owen also considered and relied on CDCR disciplinary reports and DSH verbal behavior and interdisciplinary notes. The CDCR disciplinary reports showed Rogers had failed to report to work assignments, refused to work, and disobeyed direct orders. The reports impacted Owen's opinion because they showed general noncooperation in a prison setting. The DSH verbal behavior reports reflected Rogers's ongoing use of profanity against staff. The interdisciplinary notes reported instances of Rogers's aggressiveness, attempts to game the system, possession of "pruno," and additional instances of profanity. All the records Owens relied on were admitted into evidence without objection.

D. *Dr. Bruce Yanofsky*

Dr. Bruce Yanofsky, a clinical and forensic psychologist, also performed an SVP evaluation of Rogers at the request of the DSH. Yanofsky tried to meet with Rogers twice, but only met him once, in 2016. During that meeting, while Yanofsky reviewed his sexual criminal history with him, Rogers became upset at questions about something Rogers believed Yanofsky should have known, and abruptly ended the interview by walking out. To prepare his evaluation, Yanofsky reviewed several records including police reports, criminal history records, probation officer reports, evaluations by other psychologists, court records, and hospital records.

Yanofsky first noted Rogers's convictions for forcible rape, forcible oral copulation and kidnapping, and assessed they were all enumerated crimes listed in the SVPA.[2] Further, he noted Rogers committed these crimes while using force and violence as required by the SVPA.

After reviewing Rogers's criminal history, the police reports, and court documents regarding Rogers's 1987 and 1989 sexual assaults, Yanofsky's diagnosis was an "unspecified paraphilic disorder" with "sadistic traits," which meant that sexual sadism was a diagnostic consideration that needed to be determined or excluded. He also diagnosed Rogers with an antisocial personality disorder and alcohol or other unknown substance abuse disorder.

Yanofsky also administered a "Static-99R" actuarial test, and initially scored Rogers as a "4". After preparing his initial report, Yanofsky reviewed exhibit No. 7, which included the 1987 amended complaint regarding Rogers's crimes against R.P. and L.J. Yanofsky believed a more accurate score for Rogers was a "5". Scores of "4"

---

[2] Both Owen and Yanofsky were incorrectly described Rogers's kidnapping conviction. Both conflated "offense" with "conviction." While the underlying facts indicate Rogers *committed* an aggravated kidnapping of S.P., he was charged with and convicted of simple kidnapping, which does not qualify.

or "5" are within the high-moderate risk range. In an earlier report, Yanofsky had scored Rogers as a "6", which was in the high range. Under the "Static-2002R", Yanofsky scored Rogers as a "4", which was within the low-moderate risk group. He also assessed Rogers under dynamic risk factors outside the "Static-99R". He concluded Rogers "resemble[d]" the population within the high risk/high needs sex offender group.

The People introduced 62 previously litigated exhibits. When asked by the court, defense counsel had no objection. Rogers did not testify or offer any defense evidence.

III

DISCUSSION

A. *Background*

Before trial, Rogers sought to exclude any testimony from the People's experts about the details of his qualifying convictions, and asked the trial court to prevent the experts from testifying to inadmissible case-specific hearsay under *Sanchez, supra*, 63 Cal.4th 665. He also "reserve[d]" unspecified Evidence Code section 352 "arguments" regarding the redaction or exclusion of exhibits or testimony until the prosecutor sought to introduce them at trial. Rogers also filed a brief entitled "Additional 402 Issues," in which he explained both counsel had "met and agreed to the redaction or exclusion of a significant number of items contained in the [People's] 89 proposed exhibits." The brief discussed "unresolved issues," and asked to exclude evidence of: (1) arrests or allegations that did not result in a conviction; (2) evidence of the two nonqualifying 1987 sexual assaults of R.P. and L.J., and the resulting conviction and punishment; (3) his future obligation to register as a sex offender; (4) his movements within the CDCR; (5) an incident where prison officials found "homemade knives;" (6) his possible involvement in drug dealing while at Coalinga State Hospital; and (7) the opinions of nontestifying experts contained in any treatment plans and nurse progress reports.

Before jury selection, and after counsel had jointly reviewed the People's proposed exhibits and agreed to certain redactions and omissions, the trial court and counsel reviewed each of the proposed exhibits. Rogers's counsel stated he had no objection to certain exhibits, and objected to others. Based on those objections, the prosecutor agreed to withdraw some exhibits and to redact certain information from others. On Rogers's other objections, the trial court excluded some exhibits and ordered additional redactions, or urged the parties to determine whether they could agree on redactions. As noted above, ultimately the People introduced 62 exhibits, some in their entirety, others redacted. When asked, Rogers's counsel stated he had no objection to this final group of exhibits.

On appeal, Rogers now challenges 57 exhibits as inadmissible hearsay: (1) six police reports concerning his qualifying 1989 convictions (exh. Nos. 11, 12, 13, 14, 16 & 17); (2) a printout of Rogers criminal history (exh. No. 1); (3) seven sets of certified court records regarding Rogers's convictions in Nevada, Shasta County, and the nonqualifying 1987 Orange County case involving R.P. and L.J. (exh. Nos. 2, 3, 7, 8, 9, 10 & 20); (4) 10 sets of CDCR records concerning Rogers prison behavior (exh. Nos. 21 & 23-31); and (5) 33 sets of DSH records concerning Rogers's misbehavior at the state hospitals (exh. Nos. 32-45, 46-64).

B. *Rogers Forfeited Hearsay Objections to the People's Exhibits by Failing to Object*

Although he concedes he did not object on hearsay grounds below, Rogers maintains he preserved a hearsay objection to the exhibits because he raised a *Sanchez* claim. He further insists the court's pretrial ruling on his evidentiary "objections" also preserved a hearsay claim for appeal. Not so.

Of the 57 exhibits he now challenges, trial counsel either agreed to their admission after his requested redactions were made, or expressly stated he had "no objection." Moreover, the two trial counsel "objections" Rogers cites pertained to exhibit

Nos. 9 and 10 only — evidence regarding the nonqualifying 1987 attacks on R.P. and L.J. — and to which his objection was based on Evidence Code section 352, not hearsay.

Evidence Code section 353 provides: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and *so stated as to make clear the specific ground of the objection or motion*. . . ." (Italics added.) "'In accordance with [Evid. Code, § 353], we have consistently held that the "defendant's failure to make a timely and specific objection" on the ground asserted on appeal makes that ground not cognizable. [Citations.]'" (*People v. Partida* (2005) 37 Cal.4th 428, 433-434.)

Thus, when a defendant objects to trial evidence, he must state "the specific ground of the objection. . . . The appellate court's review . . . is then limited to the stated ground." (*People v. Kennedy* (2005) 36 Cal.4th 595, 612, disapproved on other grounds by *People v. Williams* (2010) 49 Cal.4th 405, 459.)

Rogers's argument his *Sanchez* objection preserved a more general hearsay objection on appeal is misplaced. While discussed in more detail below, a *Sanchez* claim is based on an expert witness's *testimony* to case-specific underlying hearsay evidence, not whether exhibits containing hearsay evidence were independently admissibile. Rogers cannot bootstrap his *Sanchez* objection to encompass a general hearsay objection to the People's exhibits. Because Rogers did not object, the trial court had no occasion to make a ruling on the admissibility of the exhibits, nor did the prosecution have an opportunity to lay any necessary foundation. Consequently, Rogers failed to preserve a hearsay objection to the exhibits he now challenges since he neither objected on hearsay grounds, nor disputed their admissibility as redacted. (Cf. *People v. Stevens* (2015) 62 Cal.4th 325, 333.)

Alternatively, Rogers claims his trial counsel was constitutionally ineffective for failing to make hearsay objections to the exhibits. This argument also fails.

Ineffectiveness of counsel involves a two-pronged test: First, Rogers must show his counsel's performance fell below an objective standard of reasonableness. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694 (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218 (*Ledesma 1*).) Second, he must also demonstrate prejudice, i.e., it is reasonable probable, not merely *possible*, "'"'that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" [Citations.]" (*People v. Yates* (2018) 25 Cal.App.5th 474, 488 (*Yates*).)

"'Surmounting *Strickland*'s high bar is never an easy task.'" (*Harrington v. Richter* (2011) 562 U.S. 86, 105 (*Richter*), quoting *Padilla v. Kentucky* (2010) 559 U.S. 356, 357.) This is because "[a]n ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve. [Citation.] . . . It is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence.'" (*Richter, supra*, 562 U.S. at p. 105.) "Whenever we are asked to consider a charge that counsel has failed to discharge his professional responsibilities, we start with a presumption that he was conscious of his duties to his clients and that he sought conscientiously to discharge those duties. The burden of demonstrating the contrary is on his former clients." (*United States v. Cronic* (1984) 466 U.S. 648, 658, fn. 23.)

Moreover, we review trial counsel's performance with deferential scrutiny, indulging a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and recognizing the many choices that attorneys make in handling cases and the danger of second-guessing an attorney's decisions.

(*People v. Maury* (2003) 30 Cal.4th 342, 389 (*Maury*); *Strickland*, *supra*, 466 U.S. at pp. 668, 687-688, 694.) "[Hence, t]actical errors are generally not deemed reversible. . . ." (*Maury*, *supra*, 30 Cal.4th at p. 389.) Furthermore, counsel is not ineffective for failing to make or pursue meritless objections or motions. (*People v. Weaver* (2001) 26 Cal.4th 876, 931; *People v. McCutcheon* (1986) 187 Cal.App.3d 552, 558-559 ["Defense counsel need not make futile objections or motions merely to create a record impregnable to attack for claimed inadequacy of counsel"].)

"The decision whether to object to the admission of evidence is 'inherently tactical,' and a failure to object will rarely reflect deficient performance by counsel." (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1335, abrogated on other grounds in *People v. Hardy* (2018) 5 Cal.5th 56, 100.) "Although trial counsel may have the duty to protect the record when their client's trial interests are truly at stake, they have no duty to object simply to generate appellate issues. Sometimes, the best action an attorney can take regarding an available objection is not to make it." (*People v. Riel* (2000) 22 Cal.4th 1153, 1202.)

Consequently, "[i]f the record 'sheds no light on why counsel acted or failed to act in the manner challenged,' an appellate claim of ineffective assistance of counsel must be rejected 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.' [Citations.]" (*People v. Ledesma* (2006) 39 Cal.4th 641, 746 (*Ledesma II*); cf. *People v. Bess* (1984) 153 Cal.App.3d 1053, 1059 [appellate court's inability to understand why counsel acted as he did cannot be a basis for inferring that he was wrong].) Rather, "[a] claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding." (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.) This is such a case.

Contrary to Rogers's claims, police reports involving a defendant's SVP-qualifying offenses are admissible under *Otto* and *Burroughs*. (*Otto*, *supra*, 26 Cal.4th at

pp. 206-207; *Burroughs, supra,* 6 Cal.App.5th at p. 410.) Trial counsel acknowledged he was aware of *Burroughs,* and that the court would admit the police reports from the 1989 assaults. Moreover, he knew R.P. was going to give live testimony regarding her 1987 sexual assault. Similarly, he was aware Rogers's criminal history record was going to be introduced and likely admitted. (See Evid. Code, §§ 452.5 & 1280; *People v. Martinez* (2000) 22 Cal.4th 106, 111-112, 134 [trial court did not abuse its discretion in admitting a criminal history printout under the official records exception to the hearsay rule].)

Similarly, Rogers's CDCR prison records could have been admitted under Penal Code section 969b,[3] and all of Rogers's statements to Owen about the 1987 assaults of R.P. and L.J. were admissible as party admissions under Evidence Code section 1220. Finally, it was possible the DSH records would be deemed admissible under Evidence Code 1280. (*People v. Landau* (2016) 246 Cal.App.4th 850, 872, fn. 7 [hospital records are admissible under the business records exception to the hearsay rule].)

Because Rogers did not object, the prosecution was not required to establish foundation for the CDCR or DSH records. We cannot speculate whether the prosecutor would have met foundational requirements, but neither can we say trial counsel was blindly required to object lest he be found ineffective.

As to the prejudice prong, "[i]t is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.'" (*Richter, supra,* 562 U.S. at p. 104.) Instead, "[t]he likelihood of a different result must be *substantial,* not just conceivable." (*Id.* at p. 112, italics added; *People v. Rogers* (2016) 245 Cal.App.4th 1353, 1367.) In this context, "[a] reasonable probability is a probability sufficient to

---

[3] Pen. Code, § 969b "allows the admission into evidence of records or certified copies of records 'of any state penitentiary, reformatory, county jail, city jail, or federal penitentiary in which' the defendant has been imprisoned to prove that a person has been convicted of a crime," including a sexually violent offense. (*Roa, supra,* 11 Cal.App.5th at p. 444; *Yates, supra,* 25 Cal.App.5th at p. 477, fn. 2.)

undermine confidence in the outcome." (*Strickland*, 466 U.S. at p. 694; *Ledesma I*, *supra*, 42 Cal.3d at p. 218.)

Here, Rogers has not met his burden to show he was prejudiced by his counsel's choices in trial strategy. This is not a close case. Rogers's sexually violent history is unmitigated and his matter-of-fact accounts to Owen of the underlying facts of that history are telling. The expert testimony, and the bases upon which it was founded, showed Rogers to be an incorrigible sexual sadist. Even if the trial court had further redacted exhibits been more carefully redacted, or some of the other complained-of exhibits excluded, it is not reasonably probable this would have affected the jury's decision. (See *Burroughs, supra,* 6 Cal.App.5th at p. 408, fn. 8 [defendant failed to demonstrate counsel's inherently tactical decision on which exhibits to lodge objections constituted deficient performance or prejudiced him in any way].)

In sum, because trial counsel did not object on hearsay grounds to the People's exhibits, Rogers cannot now raise that ground on appeal. Because trial counsel's reasons for not raising hearsay objections to the exhibits do not appear in the record before us, nor does Rogers show how he was prejudiced, he has failed to meet his burden to show ineffective assistance of counsel on appeal. "[F]ailure to object will rarely establish ineffective assistance. [Citations.] . . . [T]his is not one of those rare cases." (*Maury, supra,* 30 Cal.4th at p. 419.) Nor is this.

C. *Sanchez Error*

Rogers next argues the People's experts prejudicially testified to 12 instances of inadmissible case-specific hearsay in violation of *Sanchez, supra,* ten by Owen and two by Yanofsky. Specifically, he alleges the jury heard case-specific hearsay from Owen about (1) the contents of the 1989 police reports; (2) Rogers's criminal history, including references to both qualifying and nonqualifying offenses; (3) Rogers's release from prison in 1988; (4) Rogers's conduct during the qualifying offenses; (5) case-specific facts underlying the diagnosis of Rogers's alcohol abuse disorder;

(6) Rogers's probation and parole violations; (7) Rogers's rule violations in prison; (8) Rogers's conduct at the state hospital; (9) Rogers's failure to participate in treatment, how he sleeps all day and stays up all night at the state hospital; (10) Rogers's comments to nurses at the state hospital that were "pretty callous, much like the comments where [*sic*] — to the woman that he raped." Rogers also contends Yanofsky stepped over the *Sanchez* line when he testified about (11) Rogers's substance abuse; and (12) the "facts" underlying his scoring of Rogers's "Static-99R."

1. *Sanchez and Hearsay*

As a general rule, hearsay evidence — "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated" (Evid. Code, § 1200, subd. (a)) — is inadmissible, "[e]xcept as provided by law" (*id.*, subd. (b)). The Legislature expanded the scope of admissible hearsay evidence in SVP proceedings by enacting section 6600, subdivision (a)(3). In part, it provides: "The existence of any prior convictions . . . [and the] details underlying the commission of an offense that led to a prior conviction . . . may be shown by documentary evidence, including, but not limited to, preliminary hearing transcripts, trial transcripts, probation and sentencing reports, and evaluations by the State Department of State Hospitals." (§ 6600, subd. (a)(3).) Thus, "it is implicit in the SVPA that the details of an offense may be proven by the multiple-level victim hearsay statements that are contained in probation reports and derived from police reports. [Citation.]" (*People v. Fraser* (2006) 138 Cal.App.4th 1430, 1444; see *Otto, supra*, 26 Cal.4th at p. 207.)

Not only does section 6600, subdivision (a)(3), authorize the admission of certain documentary hearsay in SVP trials, but as expert witnesses traditionally testify in such proceedings, other hearsay rules also become relevant. "A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience,

training, and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion." (Evid. Code, § 802.)

Thus, experts may testify to certain otherwise inadmissible hearsay. "'[T]he common law recognized that experts frequently acquired their knowledge from hearsay . . . .' [Citations.] . . . [Citations.] As such, an expert's testimony concerning his general knowledge, even if technically hearsay, has not been subject to exclusion on hearsay grounds." (*Sanchez, supra,* 63 Cal.4th at p. 676.) On the other hand, "an expert has traditionally been precluded from relating *case-specific* facts about which the expert has no independent knowledge." (*Ibid.*) Case-specific facts are "those relating to the particular events and participants alleged to have been involved in the case being tried." (*Ibid.*)

Previous cases held an expert could testify to the basis of his or her opinion, even if that testimony included inadmissible hearsay evidence, so long as the jury was instructed that "'matters admitted through an expert go only to the basis of his opinion and should not be considered for their truth.' [Citation.]" (*Sanchez, supra,* 63 Cal.4th at p. 679.) However, that "paradigm is no longer tenable because an expert's testimony regarding the basis for an opinion *must* be considered for its truth by the jury." (*Ibid.*)

Consequently, an expert cannot testify to case-specific hearsay statements unless those statements "are independently proven by competent evidence or are covered by a hearsay exception." (*Sanchez, supra,* 63 Cal.4th at p. 686.) An expert may "testify about more generalized information to help jurors understand the significance of those case-specific facts. An expert is also allowed to give an opinion about what those facts may mean." (*Id.* at p. 676.) In sum, *Sanchez* restored the common law rule that an expert is not permitted to testify about otherwise inadmissible case-specific facts. (*Ibid.*)

2. *Standard of Review*

In SVP cases, we assess prejudice resulting from the admission of expert testimony in violation of *Sanchez* under the standard of *People v. Watson* (1956)

46 Cal.2d 818, 836 (*Watson*). (*People v. Flint* (2018) 22 Cal.App.5th 983, 1003-1004 (*Flint*); *Roa, supra*, 11 Cal.App.5th at p. 455; cf. *People v. Jeffrey G.* (2017) 13 Cal.App.5th 501, 510 (*Jeffrey G.*) [not guilty by reason of insanity commitment].) The *Watson* standard applies "even where the expert's testimony included multiple statements that were inadmissible under *Sanchez*." (*Flint, supra*, at p. 1004.) Under this standard, reversal is required only if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Watson, supra*, 46 Cal.2d at p. 836.)

As noted above, *Sanchez* held an expert may testify to case-specific hearsay only if it is "independently proven by competent evidence or [is] covered by a hearsay exception." (*Sanchez, supra*, 63 Cal.4th at p. 686.) Despite this language, Rogers argues other parts of *Sanchez* suggest case-specific testimony is per se inadmissible, even if independently admissible evidence underlies the testimony. He acknowledges the issue is not settled.

One case supports his position. (See *People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 413 (*Vega-Robles*) ["testimony about case-specific facts of which [the expert] does *not* have personal knowledge is inadmissible, *even if specific facts are independently proven by other evidence*" (second italics added)]; but see *People v. Stamps* (2016) 3 Cal.App.5th 988, 996 (*Stamps*) ["If it is a case-specific fact and the witness has no personal knowledge of it, *if no hearsay exception applies*, and if the expert treats the fact as true, the expert simply may not testify about it" (italics added)].)

Other cases have concluded an expert may testify about case-specific facts proven independently or that come within a hearsay exception. (See *Jeffrey G., supra*, 13 Cal.App.5th at p. 510 ["If prior unobjected testimony supported the prosecution experts' case-specific testimony," then "the testimony [is] not objectionable under *Sanchez*"]; *Roa, supra*, 11 Cal.App.5th at p. 450 ["The limitation on expert testimony . . . applies to case-specific facts that are not independently proven or covered by a hearsay

exception"]; *Burroughs, supra*, 6 Cal.App.5th at p. 407 ["Under *Sanchez*, admission of expert testimony about case-specific facts was error — unless the documentary evidence the experts relied upon was independently admissible"].)

In *Flint, supra*, the court addressed whether case-specific statements are inadmissible under *Sanchez* even when other evidence, such as witness testimony, independently establishes those case-specific facts. The court acknowledged an apparent conflict in the appellate courts over the issue, but found the opinions were "only superficially in tension with one another." (*Flint, supra*, 22 Cal.App.5th at p. 1000.) "The correct analysis, in our view, boils down to harmless error. It seems to us that even if the admission of expert testimony reciting as true case-specific hearsay that was independently proven through other witnesses technically constituted error, at most such error would be harmless on this record." (*Id.* at p. 1000; cf. *Vega-Robles, supra*, 9 Cal.App.5th at p. 414 [admission of expert testimony based on inadmissible hearsay was harmless error, given the "plethora of admissible evidence" on defendant's gang affiliation and leadership status].) We need not resolve the issue here because, like *Flint*, we find any *Sanchez* error was harmless.

3. *Application*

Any case-specific hearsay mentioned by Owen and Yanofsky was drawn from documents introduced and admitted into evidence *without objection*. This distinguishes the current case from those cases where *Sanchez* error was egregious enough to warrant reversal. (See *Yates, supra*, 25 Cal.App.5th at p. 485 [all case-specific facts related by the experts were from documents neither introduced or admitted into evidence, nor shown to fall within a hearsay exception]; *Roa, supra*, 11 Cal.App.5th at p. 452 [reports themselves were not admitted into evidence]; *Burroughs, supra*, 6 Cal.App.5th at p. 407, fn. 7 [no hospital records were introduced or admitted at trial so anything experts said about the contents of those records was improper under *Sanchez*].)

As noted above, we evaluate *Sanchez* error under the *Watson* standard, i.e.,

reversal is required if and only if it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. (*Jeffrey G., supra,* 13 Cal.App.5th at p. 510; see also *Flint, supra,* 22 Cal.App.5th at pp.1003-1004 [even though multiple statements were inadmissible under *Sanchez*].) Under *Watson*, "it is the burden of [the appellant] to show that it is reasonably probable that [he] would have received a more favorable result at trial had the error not occurred." (*Christ v. Schwartz* (2016) 2 Cal.App.5th 440, 447.) Rogers acknowledges this standard, but fails to meet this burden.

Here, because any case-specific hearsay the experts mentioned to the jury was contained in the exhibits, R.P.'s testimony, or Rogers's own admissions, any prejudice was necessarily de minimis. Rogers admitted to both his qualifying and nonqualifying sex crimes, and his statements were properly admitted. (*Yates, supra*, 25 Cal.App.5th at p. 485.) R.P. testified and, as a result, any case-specific references to the circumstances of her sexual assault already were *directly* before the jury. The police reports underlying the 1989 qualifying offenses were independently admissible pursuant to section 6600, subdivision (a)(3). (*Burroughs, supra*, 6 Cal.App.5th at p. 410; cf. *Otto, supra,* 26 Cal.4th at p. 207-208.) And Rogers's criminal history was admissible under Evidence Code section 1280. (*Martinez, supra,* 22 Cal.4th at p. 112.)

Any official court records not otherwise admissible under either section 6600, subdivision (a)(3), Evidence Code sections 1220, 1271, 1272 or 1280, were independently admissible under Evidence Code section 452.5 and Penal Code section 969b. (*People v. Skiles* (2011) 51 Cal.4th 1178, 1186 ["[A] properly certified copy of an official court record is a self-authenticated document that is presumptively reliable, and standing alone may be sufficient to prove a prior felony conviction".) An abstract of judgment showing SVP-qualifying offenses is admissible to prove the defendant was convicted of those offenses. (*Burroughs, supra*, 6 Cal.App.5th at p. 403; see also *People*

v. Dean (2009) 174 Cal.App.4th 186, 196 [prison records may prove qualifying priors under Pen. Code, § 969b].)

The prosecutor argued the hospital and prison records were admissible as official records under Evidence Code section 1280, and stated he was prepared to lay a proper foundation. Rogers did not object after these records were redacted to his satisfaction. As a result, these records were in evidence and expert testimony about case-specific hearsay from those reports was harmless. (Cf. *Flint, supra,* 22 Cal.App.5th at p. 1000 ["[E]ven if the admission of expert testimony reciting as true case-specific hearsay that was independently proven through other witnesses technically constituted error, at most such error would be harmless on this record"].)

Rogers argues that while portions of some of the exhibits may have been admissible, other portions were not, and they should have been further redacted. However, "'where evidence is in part admissible, and in part inadmissible, "the objectionable portion cannot be reached by a general objection to the entire [evidence], but the inadmissible portion must be specified." [Citations.]'" (*Burroughs, supra*, 6 Cal.App.5th at pp. 408-409.) Thus, Rogers's failure to object more specifically forfeited this corollary claim. Moreover, Rogers merely has asserted, but not shown, how further redaction of the exhibits would have made it more likely the jury would have come to a different conclusion. Thus, even if error, it too was harmless.

The expert testimony was based primarily on Rogers's qualifying offenses in 1989, R.P.'s testimony regarding what Rogers did to her in 1987, admissions Rogers had made about both the 1987 and 1989 offenses, court and criminal history records, and the results of the standardized tests. None of it was unduly inflammatory or otherwise likely to have led the jury to unfairly reach its verdict. Based on the record before us, it is not reasonably probable the jury would have reached a different conclusion absent any erroneously admitted case-specific hearsay. (Cf. *People v. Martinez* (2001) 88 Cal.App.4th 465, 487, fn. 8.)

D. *Cumulative Error*

"Under the 'cumulative error' doctrine, we reverse the judgment if there is a 'reasonable probability' that the jury would have reached a result more favorable to defendant absent a combination of errors." (*People v. Poletti* (2015) 240 Cal.App.4th 1191, 1216.) We have found none of Rogers's assigned errors "individually warrants reversal of the jury's verdict. Nor do they cumulatively 'rise by accretion to the level of reversible and prejudicial error.' [Citation.]" (*Shazier, supra,* 60 Cal.4th at p. 150.)

IV.

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

IKOLA, J.